be applied to a case such as the present one in which there has been a common mistake of a fundamental character which has resulted in a total failure of consideration.

It was contended by counsel for the first and second defendants that the purchaser in the case of a completed contract for sale of land, where there has been no fraud, can recover the purchase-money only in two types of cases, the first being where the property is non-existent and the second being where the purchaser is in fact the owner of the property. In none of the decided cases has this proposition been laid down. On the contrary, the proposition runs counter to the passages in the judgments in the case of *Svanosio* v. *McNamara, supra,* to which I have referred and which I respectfully adopt. There is no logical reason why cases of common mistakes of the sort under consideration should be confined to the two types of cases described by counsel. In my opinion, these two types of cases are merely examples of common mistakes of a fundamental character which have resulted in a total failure of consideration.

It follows from the foregoing that, in my judgment, the third defendant is entitled to recover the sum actually paid by him to the first and second defendants. This was the sum of $6,342.20, after apportionment of assessments and property tax. As it was impossible to perform the contract owing to the common mistake to which I have referred, and as the first and second defendants cannot be held to be responsible for it, the third defendant cannot recover the conveyancing costs which were paid by him to his own solicitors.

For the reasons which I have stated, I would dismiss this appeal with costs but would vary the judgment of the court below by substituting the sum of $6,342.20 for the sum of $6,687.75.

Appeal dismissed.

Solicitors: *Eber & Tan; Hilborne & Co.*

RE LOIS THERESA KAO
Ex parte THE OFFICIAL ASSIGNEE

[O.Bk.J. (Choor Singh J.) August 3, 1965]
[Singapore — In Bankruptcy No. 226 of 1963]

Bankruptcy — Conveyance by bankrupt — Application by official assignee to declare conveyance void — Good faith — Fraud — Bankruptcy Ordinance (Cap. 11), ss. 51 and 52.

Conveyancing — Conveyance by bankrupt — Valuable consideration — Good faith.

The official assignee applied for an order to declare a conveyance of property by a bankrupt void as against the official assignee and for an order to set it aside. The grounds on which the official assignee relied were: (a) the conveyance was not made in good faith or for valuable consideration and therefore void under section 51 of the Bankruptcy Ordinance; (b) the conveyance was an act of bankruptcy because it was a fraudulent conveyance; (c) the conveyance was fraudulent and void under section 52 of the Bankruptcy Ordinance.

Held: (1) the conveyance in this case was made for valuable consideration and in good faith and was therefore not void against the official assignee under section 51 of the Bankruptcy Ordinance;

(2) the conveyance was not an act of bankruptcy because it was not made fraudulently;

(3) the property was not conveyed in satisfaction of any debt due to the vendor and therefore section 52 of the Bankruptcy Ordinance had no application to the case.

Cases referred to:—

(1) *Re Yeow Heap Seng* [1965] 2 M.L.J. 67.

(2) *Re Anson Cycle & Motor Works* [1960] M.L.J 171.

(3) *In re Tetley* 3 Manson 226 at p. 235.

(4) *Copis* v. *Middleton* (1818), 2 Mad. 430.

(5) *Eastwood* v. *Brown* (1825), Ry. & Mood. 312.

(6) *Shears* v. *Goddard* [1896] 1 Q.B. 406.

BANKRUPTCY.

K. S. Chung for the official assignee.

Yin Ee Kheng for the respondent.

R. C. H. Lim for Chung Khiaw Bank.

Cur. Adv. Vult.

Choor Singh J.: This was a motion on behalf of the official assignee for an order declaring that the conveyance dated the 21st August 1963 and made between the abovenamed bankrupt Lois Theresa Kao as vendor and Leong Lai Peng as purchaser of house No. 15 Frankel Avenue, Singapore, was void against the official assignee, and for an order that it may be set aside. The grounds on which the motion was based were:—

(1) the conveyance was not made in good faith or for valuable consideration;

(2) the conveyance was an act of bankruptcy because it was fraudulent; and Lois Theresa Kao's bankruptcy related back to it, and her property divisible among her creditors included the said house; and, alternatively

(3) that the conveyance was fraudulent and void against the official assignee.

The bankrupt is a spinster and is 47 years of age. She was born in China and came to Singapore in 1940. She has been here ever since. Although she has written a book on cookery and another in the Hokkien dialect she has earned a living mainly by giving tuition in Chinese dialects and by doing translations for advertising firms. In or about the year 1957 she became interested in business and became a partner in a number of business ventures with varying degrees of success. Ultimately all these enterprises failed with the result that she was adjudged a bankrupt on the 17th January 1964 with liabilities amounting to $174,255 due to

four creditors and assets worth $4,544.31 only.

The bankrupt purchased No. 15 Frankel Avenue, Singapore, on the 15th May 1959 for $30,000 of which she paid $18,000 from her own monies and raised the balance by mortgaging the property to the Great Eastern Life Insurance Co., Ltd. for $12,000. In October 1962 the bankrupt paid off the amount due on the mortgage to the Great Eastern Life Insurance Co., Ltd. as the rate of interest charged by this company was high. She then mortgaged the property to Chung Khiaw Bank Ltd. to secure an overdraft on her current account with the bank up to the limit of $16,000.

The respondent Leong Lai Peng is the wife of Kao Wei Tseng who is a brother of the bankrupt. The facts relevant to the sale of the house to Leong Lai Peng are as follows. In or about the first week of July 1963 the bankrupt told her brother the said Kao Wei Tseng (whom I shall call Kao) that she intended to sell her house No. 15 Frankel Avenue, Singapore, because a specially endorsed writ of summons had been issued against her on the 3rd July 1963 by one Koh Sin Bin who was claiming the sum of $5,560.90 being the balance due by her in respect of monies advanced to her from time to time. The bankrupt told her brother that the sale of her house would enable her to repay the said debt. The house in question is named "Soon Kwong Villa" after the bankrupt's mother who died on the 3rd February 1963. On hearing that the house was to be sold, Kao became distressed by the thought that within a few months of their mother's death the house would pass out of the control of their family. Kao decided to purchase the property as a gift to his wife and informed the bankrupt that subject to his wife's approval he would like to purchase the house. It was agreed between the bankrupt and her brother that the sale price would be $31,000 and that her brother would, on the signing of the sale contract, pay her 20% of the sale price so that she could pay Koh Sin Bin the amount due to him.

The respondent Leong Lai Peng had no objection to her husband purchasing the property in her name and on the 13th July 1963 Kao instructed Messrs. R. C. H. Lim & Co. to act on behalf of his wife Leong Lai Peng in the purchase of No. 15 Frankel Avenue, Singapore. On the 15th July 1963 the sale contract was signed by the bankrupt as vendor and Leong Lai Peng as purchaser for the sale of No. 15 Frankel Avenue at the price of $31,000, and a sum of $6,200 was paid as deposit on that day by the purchaser to the bankrupt. The contract provided for completion on the 15th October 1963 or earlier at the vendor's option and the vendor was to give vacant possession to the purchaser on completion.

On the 16th August 1963 Messrs. R. C. H. Lim & Co. who acted for both the vendor and the purchaser wrote to Leong Lai Peng requesting her to call at their office to execute the conveyance. On the 17th August 1963 Leong Lai Peng handed to Messrs. R. C. H. Lim & Co. two cheques, one for $16,000 and the other for $9,902.80 making a total of $25,902.80 which was the balance due on completion of the purchase. Before the property could be conveyed to Leong Lai Peng, it had to be re-conveyed to the bankrupt by the Chung Khiaw Bank to whom a sum of $16,509.30 was due. This sum was paid to the bank out of the purchase money received from Leong Lai Peng. The bankrupt executed the conveyance in favour of Leong Lai Peng on the 17th August 1963 and delivered it as an escrow pending completion of the reconveyance by the bank. The reconveyance was executed by the bank on the 21st August 1963 and the sale by the bankrupt to Leong Lai Peng was completed on that date. After payment of the legal charges and disbursements the bankrupt received $8,146.11 on completion of the sale, which sum together with the deposit of $6,200 made a total of $14,346.11 and that was all that the bankrupt received from the sale of No. 15 Frankel Avenue, Singapore.

On the day she purchased this property, Leong Lai Peng mortgaged it to the Chung Khiaw Bank to secure an overdraft on her current account up to the limit of $16,000 and the cheque for $16,000 which she handed to Messrs. R. C. H. Lim & Co. on the 17th August 1963 was drawn on this account. I have given all these details because on the day this motion was heard the property in question was still under mortgage by Leong Lai Peng to the Chung Khiaw Bank. The bank was represented at the hearing and it opposed the motion of the official assignee. Moreover, it is important to bear in mind that when the bankrupt agreed to sell this property, it was under mortgage by her to the same bank and there was a sum of $16,509.30 due under that mortgage. The property was redeemed by the bankrupt with monies provided by the respondent Leong Lai Peng, and therefore, if the court had to set aside the conveyance, it could only be set aside on the terms that the official assignee paid the respondent the sum of $16,509.30 being the amount which had been paid to the bank in discharge of the bankrupt's mortgage. See *Re Yeow Heap Seng.*[1] And in that event, the respondent Leong Lai Peng would have had to pay out of the sum of $16,509.30 received from the official assignee, the amount due under her mortgage to the bank. It was therefore clear at the hearing, when all the facts had been brought out, that in so far as the Chung Khiaw Bank was concerned, its position was fully secured. It did not stand to lose any money even if the official assignee succeeded in his motion.

The official assignee relied on three grounds to set aside the conveyance. The first was based on section 51 of the Bankruptcy Ordinance. The relevant portions of the section are:—

> 51(1) Any settlement of property, not being....a settlement made in favour of a purchaser....in good faith and for valuable consideration....shall, if the settlor becomes bankrupt within two years after the date of the settlement, be absolutely void against the official assignee.
>
> (3) For the purpose of this section "settlement" includes any conveyance or transfer of property.

The effect of this section was considered by the Singapore Court of Appeal in *Re Anson Cycle & Motor Works.*(2) The Court of Appeal held that upon the true construction of this section, a conveyance made either in bad faith or without valuable consideration is absolutely void against the official assignee; that the burden of proof is on the official assignee; and that if the official assignee shows that either valuable consideration or good faith on the part of the purchaser was lacking, he has discharged the onus of proving that the settlement is void under this section.

In the present case there was no doubt that the conveyance was made for valuable consideration. The evidence showed that the respondent paid $31,000 for the property in question and it was in fact conceded on behalf of the official assignee that there was valuable consideration. It was also quite clear from the evidence, that the property was bought by the bankrupt's brother Kao as a gift to his wife Leong Lai Peng and although the property was conveyed to the respondent Leong Lai Peng and was registered in her name, Kao was the real purchaser. He was the person who negotiated the sale with his sister the bankrupt; he gave instructions to Messrs. R. C. H. Lim & Co. to act for his wife Leong Lai Peng and he made all the financial arrangements to provide the purchase money. And if the conduct of the purchaser had any bearing on this matter, it was the conduct of Kao that had to be carefully examined.

It was contended on behalf of the official assignee that good faith on the part of Kao was lacking because he acted in collusion with the bankrupt who made the conveyance fraudulently, to delay, hinder or defeat her creditors. It is of course true, as was observed by Vaughan Williams, J. in *In re Tetley,*(3) at p. 235, "that the good faith to be looked at is the good faith of the purchaser, and not the good faith of the settlor...." But the question of a purchaser's good faith can only arise if it is proved that the settlement was made by the bankrupt fraudulently, to delay, hinder or defeat his creditors. Therefore, in the present case, the first question that fell to be decided was whether or not the bankrupt made the conveyance fraudulently, to delay, hinder or defeat her creditors.

On the 15th July 1963 when the bankrupt contracted to sell the property in question, two writs had already been issued against her. The first one was issued some two years earlier and it was a claim for $129,000. The second writ was issued on the 3rd July 1963 claiming $5,560.90. The bankrupt believed that she had a good defence to the claim of $129,000 and that she had no defence at all to the claim of $5,560.90. She had to find money to pay the debt of $5,560.90 and she decided to sell her house No. 15 Frankel Avenue, Singapore.

Counsel for the official assignee submitted that the house was sold by the bankrupt so that it may not be available to the petitioning creditor who was the person claiming $129,000 from the bankrupt in Suit No. 1578 of 1961. Counsel tried to connect the various steps in the sale of the property with the dates of hearing of Suit No. 1578 of 1961. It was suggested that the bankrupt decided in July 1963 to sell the house in question because she had been informed by her solicitors on the 7th July 1963 that Suit No. 1578 of 1961 had been fixed for hearing on the 6th, 7th, 8th and 9th of August 1963. The hearing of that action was not concluded on 9th August and it was adjourned to a date to be fixed by the registrar. There was a fixing of cases by the registrar on the 17th August 1963 when Suit No. 1578 of 1961 was fixed for hearing on 2nd, 3rd and 4th September. It was alleged by counsel for the official assignee that the bankrupt was informed of these new dates of hearing by her solicitor before she conveyed the property on the 21st August 1963 and that although the completion of the sale was to take place on the 15th October 1963 the bankrupt expedited the completion so that the property could be conveyed to the respondent before the conclusion of Suit No. 1578 of 1961.

The completion of the sale was to take place on 15th October 1963 or earlier at the vendor's option. The bankrupt must have given instructions on or before the 16th August 1963 for completion because on that date Messrs. R. C. H. Lim & Co. wrote to the respondent Leong Lai Peng requesting her to call at their office to execute the conveyance. The fixing of cases took place before the registrar on the 17th August 1963 and the bankrupt claimed that she received a letter from her solicitor on or after the 25th August 1963 and it was from this letter that she learnt of the new dates of hearing. Counsel for the official assignee challenged the bankrupt to produce that letter or a copy of it. The bankrupt obtained a copy of it (Ex. P.8) from her solicitor and produced it in court. This letter is dated the 21st August 1963 and the earliest date on which she could have received it through the post would be the 22nd August 1963. But

the instructions to her solicitor to complete the purchase were given on or before the 16th of August. In my view the dates of hearing of Suit No. 1578 of 1961 did not play any part in the bankrupt's decision to sell the property in question. If the bankrupt had any intention of preventing the property from falling into the hands of the petitioning creditor, she could have sold it in 1961 when she was served with the writ claiming $129,000 against her.

In my opinion, when the bankrupt decided to sell the property, she had no intention whatever of defeating her creditors. She sold the property to pay off some of her creditors. The sale of the property left the bankrupt with $14,346.01 after paying the amount due to the bank on the mortgage. And according to the bankrupt's statement (Ex. P.1) made to the official assignee on the 17th April 1964 she utilised this sum as follows:—

Paid to Koh Sin Bin		$5,625.90
Paid to Lucy L. B. Yong		4,000.00
Paid to F. Y. Khoo		4,000.00
Paid to Laycock & Ong		150.00
		$13,775.90
	balance	570.11
	Total	$14,346.01

The bankrupt's account of her disposal of the proceeds of sale was not challenged by the official assignee. It was clear, that, in addition to the bank, she paid off three other creditors. It was equally clear that out of the sale price of $31,000 the sum which went into the bankrupt's pocket was only $570.11. The bankrupt's dominant motive in selling the property was to pay off with the proceeds of the sale, as many of her creditors as she could and not, as alleged, to delay, hinder or defeat her creditors. The conveyance was therefore not made fraudulently within the meaning of section 3(1)(b) of the Bankruptcy Ordinance.

As the conveyance was not made fraudulently, the question of the purchaser's good faith did not arise. But I did examine the purchaser's conduct in this matter in case it might be held that I was wrong in coming to the conclusion that the conveyance was not made fraudulently. As indicated earlier, the purchaser, to all intents and purposes, was the bankrupt's brother Kao. The fact that he was a brother of the bankrupt was of no consequence because he paid the full market price for the property. And it has been held by Plumer V.C. in *Copis* v. *Middleton*,[4] that there is no fraud in selling to a relative. If on account of her relationship the bankrupt had sold the property to her brother for less than she would have done to a stranger, that would have been material but that was not what happened in this case.

As to the sufficiency of the consideration the most reliable evidence before the court was that of Lim Chuan Geok (P.W.9), who is the managing director of Cheong Koon Seng & Co., Ltd., a firm of licensed auctioneers and appraisers. This witness stated that in his opinion house No. 15 Frankel Avenue, Singapore, was worth $30,000 on the 21st August 1963 and he gave reasons for his opinion. In my view his reasoning was very sound and I therefore accepted his opinion as against that of Yeo Wee Seet (P.W.3), the valuer called on behalf of the official assignee, who stated that the property, if offered for sale by public auction, with vacant possession, in August 1963, would have fetched $35,000 to $40,000, but gave no reasons for his opinion. I therefore held that the value of the property when it was conveyed to the respondent was about $30,000 and that the purchase price of $31,000 paid by the respondent was fair, reasonable and adequate in the circumstances.

If the bankrupt was insolvent when she conveyed the property, there was no evidence that Kao or his wife Leong Lai Peng knew it. And if the bankrupt's sole reason for selling the property was to delay, hinder or defeat her creditors, there was no evidence that Kao or his wife were aware of it. It has suggested that Kao, being a brother of the bankrupt, must have known fairly well the financial affairs of his sister especially when she had on a previous occasion borrowed money from him. Kao testified that the bankrupt did not tell him about the claim of $129,000 against her and that he first came to know of it when he read about it in the newspapers. Kao stated that his sister never discussed her business affairs with him. Kao impressed me as a truthful witness and there was no reason to disbelieve him. I therefore accepted his evidence that he did not know the state of the bankrupt's financial affairs when he agreed to purchase the property from her.

It was contended on behalf of the official assignee that although the contract of sale provided for the vendor to give vacant possession to the purchaser on completion, vacant possession had not been given on the signing of the conveyance, and that the bankrupt was still in possession of the property and in fact continued to reside on the premises after the sale and that this was evidence of fraud. In my view it was not correct to say that the bankrupt was still in possession of the property after the conveyance had been signed. What happened was that the bankrupt had failed to obtain alternative accommodation and when the conveyance was signed, she requested her brother to allow her to live in the house for another month or so until she could obtain some other accommodation. Her brother agreed to this. In November 1963, the bankrupt informed her brother that although

she had tried very hard she had failed to obtain alternative accommodation and requested him to allow her to live in one room at the rear portion of the house. Kao and his wife Leong Lai Peng agreed to this and thereupon they took possession of the house and rented it to a European family at $175 per mensem. Ever since that day the respondent has been collecting the rent and has been in possession of the house through her tenant. It is true that the bankrupt continued to reside in a room at the rear portion of the premises free of rent but she was there on sufferance. She was certainly not in possession of the premises.

It has been held that the mere fact that no possession has been given in accordance with the sale deed is not conclusive proof of fraud. In *Eastwood* v. *Brown*,(5) Abbot, Lord Chief Justice of England, said:—

> "The circumstance of an assignor who is under pecuniary embarrassments, remaining in possession of the property assigned, is always suspicious; but if it does not appear, from other facts in the case that this takes place under a fraudulent assignment between the parties, for the purpose of delaying creditors, I am of opinion that it is not itself a conclusive badge of fraud."

In the present case, the bankrupt was allowed by the respondent to remain on the premises on humanitarian grounds. The fact that the bankrupt was still on the premises after the sale of the property to the respondent was therefore no evidence of fraud or bad faith on the part of the respondent.

Having considered carefully all the evidence before me in this case and in particular all the circumstances surrounding the sale of the property to the respondent, I was fully satisfied that Kao and his wife Leong Lai Peng the respondent acted in good faith when the property was conveyed to the respondent. They were not privy to the fraud, if any, committed by the bankrupt against her creditors. The conveyance was therefore not void against the official assignee under section 51 of the Bankruptcy Ordinance.

I now come to the second ground on which the official assignee sought to set aside the conveyance; that the conveyance was an act of bankruptcy because it was a fraudulent conveyance and that the official assignee's title related back to that act of bankruptcy because it was committed within six months next preceding the date of the presentation of the bankruptcy petition, and that therefore the bankrupt's property, divisible among her creditors, included the said house. In view of my finding that the conveyance was not made fraudulently, it was not an act of bankruptcy and therefore Lois Theresa Kao's bankruptcy did not relate back to it. Accordingly her property, divisible amongst her creditors, did not include the house in question. And even if the conveyance was made fraudulently, the respondent was entitled to invoke section 53 of the Bankruptcy Ordinance to protect the conveyance. The relevant parts of the section are:—

> "Subject to the foregoing provisions of this Ordinance with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, nothing in this Ordinance shall invalidate in the case of a bankruptcy — any conveyance by the bankrupt for valuable consideration....
>
> Provided that (i) the....conveyance takes place before the date of the receiving order; and (ii) the person....to whom the....conveyance....was made has not, at the time of the....conveyance, notice of any available act of bankruptcy committed before that time."

Both the conditions were complied with: the conveyance took place before the date of the receiving order; there was no evidence of any act of bankruptcy committed before the time of the conveyance; the respondent could not at the time of the conveyance, therefore, have had notice of something which did not exist.

Counsel for the official assignee submitted that the bankrupt had committed an act of bankruptcy on the 21st July 1963 when, in collusion with the respondent, the bankrupt purported to sell to the respondent all her furniture in house No. 15 Frankel Avenue, Singapore. What happened was that the petitioning creditor, after obtaining judgment for $129,000 against the bankrupt, seized on the 3rd October 1963 all the furniture in No. 15 Frankel Avenue, Singapore, towards satisfaction of the judgment. The respondent took out an interpleader summons claiming that the furniture that had been seized was her property, she having purchased it from the bankrupt on the 21st July 1963 for $2,500. Kulasekaram J. dismissed the respondent's claim. As no reasons were given for the decision, it is not known on what grounds the claim of the respondent was dismissed. For the official assignee it was argued that the purported sale of the furniture by the bankrupt to the respondent on 21st July 1963 was a fraudulent transaction within the meaning of section 3(1)(b) of the Bankruptcy Ordinance and therefore an act of bankruptcy. For the respondent it was argued that the respondent was purchasing house No. 15 Frankel Avenue, Singapore, for the purpose of renting it out fully furnished and the agreement to purchase the house entered into on the 15th July 1963 was followed six days later, on the 21st July 1963, by an agreement under which the furniture in the said house was sold to the respondent for $2,500, and that there was nothing fraudulent about both these transactions. In my opinion both these transactions were connected and either both of them were fraudulent or both were not fraudulent. There was no evidence before me that either of them was a fraudulent transaction within the meaning of section 3(1)(b) of the Bankruptcy Ordinance.

Accordingly the bankrupt did not commit an act of bankruptcy on the 21st July 1963 when she agreed to sell her furniture to the respondent. And even if the bankrupt sold the furniture on the 21st July 1963 to prevent it from being seized by any of her creditors, there was no evidence that the respondent was aware of this fact when she purchased the furniture from the bankrupt. The respondent was a purchaser in good faith and for valuable consideration. In my opinion the respondent had no notice of any act of bankruptcy when house No. 15 Frankel Avenue, Singapore, was conveyed to her.

In *Re Anson Cycle and Motor Works, supra,* the Court of Appeal held that besides the conditions laid down in section 53 of the Bankruptcy Ordinance, good faith was required on the part of the person to whom the conveyance was made, and that the court will not afford protection to any transaction that is not entered in good faith. In that case it was held that a fraudulent sale of property by the bankrupt which came within the terms of the section in question was not protected as the purchaser had not acted in good faith. But in *Shears* v. *Goddard* [6] it was held that a fraudulent sale of property by the bankrupt which came within the terms of the section in question was protected, although it was itself an act of bankruptcy, as the purchasers had acted in good faith. In the present case I was satisfied that both the respondent Leong Lai Peng and her husband acted in good faith and the respondent was therefore entitled to the protection of section 53 of the Bankruptcy Ordinance.

The third ground on which the official assignee relied was that the conveyance was fraudulent and void against him under section 52 of the Bankruptcy Ordinance. The relevant portions of the section are:—

> 52(1) Every conveyance made....by any person unable to pay his debts as they become due from his own money in favour of any creditor with a view of giving such creditor....a preference over other creditors, shall, if the person making....the same is adjudged bankrupt on a bankruptcy petition within three months after the date of making....the same be deemed fraudulent and void against the official assignee.

Neither the respondent Leong Lai Peng nor her husband were creditors of the bankrupt. The property was not conveyed in satisfaction of any debt due to the respondent or to her husband. The section had therefore no application to the facts of this case.

For the above reasons the motion of the official assignee was dismissed with costs.

Motion dismissed.

Solicitors: *Chung & Co.; Yin Ee Kheng; R. C. H. Lim & Co.*